

Ahmed (Migration) [2023] AATA 3761 (28 August 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Farid Ahmed
VISA APPLICANTS:	Mrs Habiba Sultana Mr As-sadik Rahaman
REPRESENTATIVE:	Ms Danielle Cooper
CASE NUMBER:	2202674
DIBP REFERENCE(S):	BCC2020/1018062
MEMBER:	Maira Brophy
DATE:	28 August 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • CI 309.211 of Schedule 2 to the Regulations; and • CI 309.221 of Schedule 2 to the Regulations • with an additional direction that the secondary visa applicant meets the following: • CI 309.312 of Schedule 2 to the Regulations.

Statement made on 28 August 2023 at 3:00pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – validly married – pooling of finances while living in different countries – household and social aspects of relationship and nature of commitment – adverse and inconsistent information about previous relationships – sponsor’s declining

health and applicant's awareness of it – member of family unit – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65, 359AA, 376

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211(2), 309.221, 309.312, Schedule 4, criterion 4020

CASE

MILGEA v Dhillon [1990] FCA 200

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

1. The issue in this application is whether the review applicant, Mr Farid Ahmed, and the first-named visa applicant, Mrs Habiba Sultana, were in a genuine and continuing relationship at the time of application and at the time of decision.

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 21 December 2021 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first-named visa applicant (the visa applicant) applied for the visa on 5 March 2020 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 because the delegate was not satisfied the parties were in a genuine, ongoing, and mutually exclusive relationship.
5. The review applicant appeared before the Tribunal on 13 March 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant Mrs Habiba Sultana. Mr Ariful Ariful, who is the review applicant's support person attended the hearing. The Tribunal was assisted by an interpreter in the Bengali and English languages.
6. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

Background

8. The visa applicant is a 46-year-old female currently residing in Bangladesh. She was previously married in the period from 24 November 2002 to 24 November 2010 to Md Mokter Hossain. There was a son of the marriage who was born in January 2004 and who is named as a secondary applicant in this application. The visa applicant was then married to Mizanur Rahman in the period from 11 November 2011 to 8 June 2016 when Mr Rahman died. The visa applicant's parents, three sisters and two brothers live in Bangladesh.
9. The visa applicant first arrived in Australia on 27 June 2016 as the holder of a Visitor visa. She lodged an application for a [Specified visa] on 26 July 2016 and was granted a Bridging Visa A (BVA) in association with her [application] on 28 July 2016. Her [application] was refused on 24 January 2017, and an application for merits review was lodged at the Administrative Appeals Tribunal (the Tribunal) on 7 February 2017. The visa applicant was granted a Bridging Visa B (BVB) on 29 January 2020. The visa applicant departed Australia on 1 March 2020, and her BVB ceased on 10 April 2020. The Tribunal affirmed the Department's [visa] refusal decision on 26 May 2020. The visa applicant applied twice for Visitor visas on 4 June 2020 and 20 October 2020, and both these applications were refused.

10. The review applicant, Mr Farid Ahmed, is a 63-year-old male living in Sydney. He has declared no previous relationships. The review applicant came to Australia on 25 March 1995 on a Medical Treatment visa. He was then granted a [Specified] visa on 2 April 1996. His parents and three sisters are deceased, he has seven brothers, one lives in London, three in Bangladesh and three in Sydney.
11. At the time of the application, the parties stated they met on 28 October 2017 at a party held by the Renaissance Social Welfare Organisation of Australia in Redfern. The parties committed to a long-term relationship to the exclusion of all others on 14 October 2019 when they married in Sydney. The visa applicant departed Australia on 1 March 2020.
12. The delegate who made the original decision on 21 December 2021 noted the following issues:
 - The delegate was not satisfied there was evidence of any financial co-operation between the parties to support the contention the parties were in a genuine and continuing relationship.
 - The delegate gave limited weight to the evidence the parties shared a joint household.
 - While acknowledging there was some evidence of the social aspects of the relationship (wedding photographs, evidence of shared time with family and friends, evidence of shared travel), the delegate was not satisfied the visa applicant and sponsor presented to family and friends as being in a genuine and continuing spousal relationship.
 - The delegate was not satisfied the parties were in a committed relationship given the limited evidence provided.

Tribunal proceedings

13. The issue in the present case is whether the visa applicant and the review applicant were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
14. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant and the visa applicant.

15. Section 376 Certificate and Section 359AA

16. At the time of hearing, the Tribunal brought to the attention of the review applicant a s 375A certificate dated 16 June 2022 on file.
17. If the material is covered by s 375A, the certificate must include a statement that the document or information must only be disclosed to the Tribunal, and the Tribunal must do all things necessary to ensure that the document or information is not disclosed to anybody except the Tribunal member to whom the case is constituted. In this case there are internal documents relating to a debt owed by the visa applicant and the Tribunal accepts that the public interest is not served by the release of the visa applicant's personal finances.
18. The other material protected under the s 375A certificate relates to information obtained by the Department by way of information provided by a concerned member of the public.

19. The Tribunal advised the review applicant that it would put to him the gist of the information provided in the interests of procedural fairness under s 359AA of the Act and advised that if the Tribunal placed weight on evidence that was inconsistent with the submission of the review applicant that he was in a genuine and continuing relationship with the visa applicant, that would lead the Tribunal to affirm the decision under review. The Tribunal explained to the review applicant that inconsistencies in the evidence may lead the Tribunal to find that he was not in the relationship he claimed and that his evidence was not credible. Furthermore, the inconsistencies may lead the Tribunal to make a finding that he was not a credible witness. The review applicant was offered an adjournment to consider the matters raised and time was given after the hearing for the review applicant to make submissions.
20. The 'gist' of the information the Tribunal considers relevant to the review was that the review applicant was still married to a woman in Bangladesh, Ms Mukti Yasmin, and that he sent her money on a regular basis.
21. The Tribunal discussed the relevance of the information and invited the review applicant to respond to the concerns raised. Prior to hearing the review applicant had provided a written submission and had attached a notice of an Annulment of Marriage. The Tribunal explained to the review applicant the relevance of the fact he had stated on the application that he had never been married, but in an affidavit dated 14 August 2013 (Department file) he had acknowledged his prior marriage to Mukti Yasmin Pria and the fact he was seeking an annulment of that marriage. There was a Nikahnama (Marriage Deed/Registration Certificate) for the review applicant and Mukti Yasmin Pia on file stating the parties married on 6 August 2013. The review applicant was put on notice that because of that disclosure it may be found that while he is in a genuine and continuing relationship with the visa applicant, he does not meet Public Interest Criteria 4020. The Tribunal was mindful the delegate had not made findings on those issues.
22. The Tribunal also raised with the parties the inconsistent evidence as to the second declared marriage of the visa applicant. In her application, the visa applicant stated she had been married to Mizanur Rahman in the period from 11 June 2011 to 8 June 2016 when Mr Rahman died. In a death certificate provided, it was not the visa applicant who was named as the surviving spouse of Mr Rahman. The Tribunal was mindful the visa applicant departed India 16 days after the death of Mr Rahman to come to Australia on a Visitor visa she had previously been granted.
23. Additional time was given for the review applicant to respond to the matters raised. Additional information was provided to the Tribunal on 24 March 2023 and has been considered by the Tribunal.
24. The parties generally gave consistent evidence about how they met, and of their time living as part of one household both in Australia, India, and Bangladesh. Their evidence was consistent as to the impact of the COVID-19 pandemic on their living arrangements as they were not able to re-enter Australia. The Tribunal did have some concerns about the matters referred to in paras 20 and 21 of this decision and also whether the prime commitment on the part of the visa applicant was to a visa to allow her to live in Australia, or to the relationship with the review applicant. Similarly, the Tribunal had concerns as to whether the review applicant was seeking a carer given his declining health, or whether he was in a committed and genuine spousal relationship. The evidence was very clear that the visa applicant was aware of the extent of the review applicant's medical conditions and the implication of that on their relationship. Overall, the Tribunal was satisfied there was sufficient evidence to support a finding the parties were in a genuine and committed relationship.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

25. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
26. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the visa applicant and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

27. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 14 October 2019 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the parties are married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

28. The review applicant lives in Sydney in a social housing unit. He pays \$86 per week in rent which is deducted from his disability support pension. He has been on a disability pension since 1996. He receives \$580 per fortnight after his rent is deducted.
29. The visa applicant lives in Bangladesh. She moved to Bangladesh from India in September 2021. She lives with her son and is paying rent. The review applicant sends her \$400 per calendar month and she also collects the rent from a property he inherited in Bangladesh.
30. During the period the parties were together in India (March 2020 to September 2021) the parties lived together in a unit owned by the sister of the applicant. They then moved to the property where the visa applicant is presently living. The review applicant continued to be paid his disability support pension but at a reduced rate and they were granted \$3000 emergency assistance by the Australian Government because they were not able to return to Australia because of COVID-19 restrictions and the visa applicant not having a visa to re-enter Australia.
31. The parties do not have a joint bank account. The review applicant sends money to the visa applicant on a regular basis to assist her with her costs and the costs of her son.

32. They do not share day-to-day household expenses while in different countries, and each maintains their own bank accounts for day-to-day expenses. This is not unusual given the review applicant is in Australia and the visa applicant is in Bangladesh.
33. The Tribunal places some weight on this aspect of the relationship as it is indicative of parties in a genuine and continuing relationship pooling their available resources despite living in different countries.

34. *Nature of the household*

35. The Tribunal accepts that since the parties married in October 2019, the review applicant and visa applicant have lived together for around three years. The Tribunal accepts the parties stayed together as a couple during the periods prior to the visa applicant leaving Australia in March 2020 and when the review applicant was in India and Bangladesh in the period from March 2020 to July 2022.
36. The parties gave consistent evidence as to the household arrangements during the periods they were together and about their plans to establish a joint household in Sydney at the unit in which the review applicant currently resides.
37. The Tribunal places significant weight on this aspect of the relationship given the periods of cohabitation since marriage.

Social aspects of the relationship

38. At the time of application, the applicants provided statutory declarations (Form 888s) from three persons who knew the parties, and who had spent time with them when the visa applicant was living in Australia.
39. The Tribunal accepts from the photographic evidence, the supporting documentation as to shared travels, the statements outlined above, and their oral testimony at hearing, that the parties have as a couple spent time with their family and friends, and they socialise within their community as a married couple.
40. The Tribunal accepts on the evidence before it that the parties present to their family and friends as a married couple.

Nature of the persons' commitment to each other

41. Given the concerns raised by the delegate, the Tribunal carefully considered the evidence as to the nature of the commitment of both parties to the relationship. The Tribunal accepts the parties have known each other since October 2017, having met through mutual interests and their cultural background.
42. The Tribunal had some concerns as to the nature of the relationship. The Tribunal was concerned the visa applicant was motivated by her desire for a visa and the opportunity to live in Australia with her son.
43. The Tribunal was mindful of consideration of motivation in *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (Northrop, Wilcox and French JJ, 8 May 1990, unreported), where motivations for marriage have been restated as follows:

... people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc as according to what may be described as "community expectations". It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or

advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.

44. The decisions of the courts referred to above make it clear that it is inappropriate for a decision-maker to draw conclusions as to the respective commitments of the parties to a marriage from a finding that the motivation for the wedding included the visa status of the parties. In the Tribunal's view, as this case demonstrates clearly, it is particularly inappropriate to draw such conclusions without first interviewing the parties and putting any concerns as to their motivation to them. The Act and Regulations provide clear guidance as to the matters that decision-makers are to consider in assessing relationships for the purposes of a Partner visa, and it is to these matters that regard must be had.
45. After carefully considering whether the evidence supported a finding that the motivation of the parties was in fact to gain a visa in the first instance, the Tribunal accepts given the timeline of the application their primary commitment was to their relationship with each other and that while a visa and the opportunity for the visa applicant to be able to stay in Australia was a part of the equation, their commitment to each other was not dependent on the visa being granted. The Tribunal was also mindful of the health of the review applicant and the implications for the visa applicant of the review applicant's declining health.
46. Based on all the evidence, the Tribunal finds the parties have a commitment to each other consistent with them being in a spousal relationship.
47. Given the above findings, the Tribunal is satisfied that at the time the visa application was lodged and at the time of this decision, the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal finds that they intend to live together in Australia and that they therefore do not live separately and apart on a permanent basis.
48. Accordingly, the Tribunal finds that the visa applicant satisfies the definition of 'spouse' in s 5F(2)(a)-(d), and that the parties are in a spousal relationship.
49. The review applicant is an Australian citizen.
50. Given these findings, the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, the parties were and continue to be in a spousal relationship. The Tribunal finds that the visa applicant is the spouse of the review applicant and satisfies cl 309.211(2) and therefore cl 309.211. The Tribunal finds that at the time of decision, the visa applicant continues to satisfy cl 309.211.
51. Therefore, the visa applicant satisfies both cl 309.211 and cl 309.221.

Secondary visa applicants

52. The Tribunal is satisfied on the basis of the application forms that the sponsorship referred to in cl 309.321 in respect of the person who satisfies the primary criteria includes sponsorship of the second named visa applicant, Mr As-Sadik Rahaman. Accordingly, the Tribunal finds that the second named visa applicant meets cl 309.312 at the time of application.
53. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
- 54.

DECISION

55. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first-named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- CI 309.211 of Schedule 2 to the Regulations; and
- CI 309.221 of Schedule 2 to the Regulations

with an additional direction that the secondary visa applicant meets the following:

- CI 309.312 of Schedule 2 to the Regulations.

Moirá Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).